Supreme Court of the United States.

No. 81.—October Term, 1903.

Harry B. Smith, Auditor of Marion County, Indiana, Plaintiff in Error,
vs.
The State of Indiana, on the relation of Martha and Benjamin Lewis.

In error to the Supreme Court of the State of Indiana.

[November 16, 1903.]

This was a petition filed in the Circuit Court of Marion County by the State, upon the relation of Martha and Benjamin Lewis, against the auditor of Marion County for a writ of mandamus to compel the defendant, in his official capacity, to allow an exemption of a mortgage of $500 upon a lot of land in Indianapolis owned by the relators, and that the same be deducted from the value of such lot.

The petition was based upon an act passed by the General Assembly March 4, 1899, the first section of which declares: "That any person being the owner of real estate liable for taxation within the State of Indiana, and being indebted in any sum secured by mortgage upon real estate, may have the amount of such mortgage indebtedness, not exceeding seven hundred dollars, existing and unpaid upon the first day of April of any year, deducted from the assessed valuation of mortgage premises for that year, and the amount of such valuation remaining after such deduction shall have been made shall form the basis for assessment and taxation for said real estate for said year."

An alternative writ having been issued, defendant interposed a general demurrer, which was sustained by the court, and the relators declining to plead further, judgment was entered against them.

Upon appeal to the Supreme Court, the action of the court below was reversed, the law held to be constitutional and the cause remanded. (158 Ind. 543.) Thereupon the defendant made formal return to the writ alleging the unconstitutionality of the act, both under the State and Federal Constitutions, to which relators demurred. The demurrer was sustained, and a judgment entered for a peremptory mandamus commanding the defendant to allow the exemption, and to deduct from the assessed valuation of the real estate the amount of the mortgage, $500, and also that relators recover from the defendant their costs, which, however, appear never to have been taxed. This judgment was subsequently affirmed

by the Supreme Court upon the authority of its opinion upon the previous appeal, and a writ of error sued out from this court.

Mr. Justice BROWN delivered the opinion of the Court.

The constitutionality of the exemption law of Indiana was apparently the only question raised by the parties. It was argued elaborately, both in the Circuit and Supreme Court of the State, and was finally affirmed by a majority of the latter court. The power of the county auditor, who is charged by law with the duty of making the assessment, to refuse to allow the relators their exemption upon the ground of the unconstitutionality of the act, does not appear to have been raised in the State courts, and is not noticed in either opinion of the Supreme Court. In fact, the celerity of the proceedings and the admissions of counsel indicate that the suit was begun and carried on for the purpose of testing the constitutionality of the law, and that the litigation was at least not an unfriendly one.

We have no doubt of the power of State courts to assume jurisdiction of the case if they chose to do so, although there are many authorities to the effect that a ministerial officer, charged by law with the duty of enforcing a certain statute, cannot refuse to perform his plain duty thereunder upon the ground that in his opinion it is repugnant to the Constitution.

It is but just to say, however, that the power of a public officer to question the constitutionality of a statute as an excuse for refusing to enforce it has often been assumed, and sometimes directly decided, to exist. In any event, it is a purely local question, and seems to have been so treated by this court in *Huntington* v. *Worthen*, (120 U. S. 97, 101.)

Different considerations, however, apply to the jurisdiction of this court, which we have recently held can only be invoked by a party having a personal interest in the litigation. It follows that he cannot sue out a writ of error in behalf of third persons. (*Tyler* v. *Judges of Court of Registration*, 179 U. S. 405; *Clark* v. *Kansas City*, 176 U. S. 114; *Turpin* v. *Lemon*, 187 U. S. 51; *Lampasas* v. *Bell*, 180 U. S. 276; *Ludeling* v. *Chaffee*, 143 U. S. 301; *Giles* v. *Little* 134 U. S. 345.) These authorities control the present case. It is evident that the auditor had no personal interest in the litigation. He had certain duties as a public officer to perform. The performance of those duties was of no personal benefit to him. Their non-performance was equally so. He neither gained nor lost anything by invoking the advice of the Supreme Court as to the proper action he should take. He was testing the constitutionality of the law purely in the interest of third persons, viz., the taxpayers, and in this particular the case is analogous to that of *Caffrey* v. *Oklahoma*, (177 U. S. 346.) We think the interest of an appellant in this court should be a personal and not an official interest, and that the defend-

ant, having sought the advice of the courts of his own State in his official capacity, should be content to abide by their decision.

It is true there seems to have been a personal judgment in form against the defendant for costs, the amount of which, however, has never been taxed, and when taxed and paid would probably be reimbursed to him. It was formerly held, under the practice which disqualified interested witnesses, that a liability for costs was sufficient to render a witness incompetent. (1 Greenl. Ev. secs. 401, 402.) But it seems to be well settled that even if the fact that costs are awarded against a party, gives him an appealable interest, of which there appears to be considerable doubt, (*Travis* v. *Waters*, 12 Johns. 500; *Reid* v. *Vanderheyden*, 5 Cow. 719, 736,) it does not give him an appealable interest in the judgment upon the merits, but limits him to the mere question of costs. (*Studebaker* v. *Markley*, 7 Ind. App. 368; *Hone* v. *Schaick*, 7 Paige, 221; *Card* v. *Bird*, 10 Paige, 426; *Cuyler* v. *Moreland*, 6 Paige, 273.) If plaintiff in error objected to this judgment for costs he might have moved to modify it in that particular. Not having done so, his appeal is presumptively from the judgment on the merits, (*American Ins. Co.* v. *Gibson*, 104 Ind. 336, 342,) and as his individual rights were not affected by such judgment, he is not entitled to an appeal.

The fact that the various statutes fixing the jurisdiction of the Circuit Courts of the United States, and of this court, which from the original Judiciary Act of 1789 have, where the amount involved was made the test of jurisdiction, uniformly used the words "exclusive of costs," would indicate, so far as the Federal courts are concerned, that a mere judgment for costs could not ordinarily be made the basis of an appeal to this court.

For the reasons above given, the appellant did not have the requisite interest to maintain this appeal, and it is therefore

Dismissed.

Mr. Justice HARLAN and Mr. Justice WHITE are of opinion that the plaintiff in error was entitled to prosecute the present writ, and that the court should determine the case upon its merits.

True copy.

Test:

Clerk Supreme Court, U. S.